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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Barry Lee Jones,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-01-00592-TUC-TMB

DEATH PENALTY CASE

**ORDER**

15 This matter is before the Court on limited remand from the Ninth Circuit Court of  
16 Appeals. (*See* Doc. 158.)<sup>1</sup> The court of appeals has ordered this Court to reconsider, in  
17 the light of intervening law, including *Martinez v. Ryan*, 132 S. Ct. 1309 (2012),  
18 Petitioner’s claim of ineffective assistance of counsel (“IAC”) in failing to conduct an  
19 adequate investigation at the guilt and penalty phases of trial (“Claim 1D”).<sup>2</sup>

20 This Court ordered supplemental briefing to address whether cause exists under  
21 *Martinez* to excuse the procedural default of Claim 1D, and whether Petitioner is entitled  
22 to habeas relief under 28 U.S.C. § 2254 on the claim. (Doc. 161.) The Court also ordered  
23 Petitioner to include any requests for evidentiary development with the supplemental  
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25 <sup>1</sup> “Doc.” refers to numbered documents in this Court’s case file (prior to August  
26 2005) and this Court’s electronic case docket (beginning August 2005).

27 <sup>2</sup> This Court previously addressed a narrow subset of Claim 1D—the allegation of  
28 ineffectiveness based solely on counsel’s failure to meet with Petitioner a sufficient  
number of times to prepare an adequate defense—and denied this portion of the claim on  
the merits. (Doc. 141 at 24.) That portion of Claim 1D is not at issue in this limited  
remand.

1 briefing. (*Id.*)

2       Petitioner filed a supplemental brief addressing the applicability of *Martinez* to  
3 Claim 1D, arguing that post-conviction counsel acted ineffectively in litigating claims  
4 against trial counsel in state court, and requesting evidentiary development and an  
5 evidentiary hearing on the procedural default of these claims. (Doc. 167.) Respondents  
6 filed a response, and Petitioner filed a reply. (Docs. 175, 180.) For the reasons set forth  
7 below, the Court finds that an evidentiary hearing is necessary to determine whether  
8 Petitioner can establish cause to excuse the procedural default of Claim 1D.

### 9                                   **PROCEDURAL BACKGROUND**

10       On April 14, 1995, Petitioner was convicted of one count of sexual abuse, three  
11 counts of child abuse, and felony murder. *State v. Jones*, 188 Ariz. 388, 391, 937 P.2d  
12 310, 313 (1997). The convictions were predicated on the physical and sexual injuries  
13 inflicted on four-year-old Rachel Gray, and the failure to obtain medical care for her  
14 injuries, which led to her death. The trial judge found the existence of two aggravating  
15 factors: that the murder was especially cruel and that the victim was under the age of 15.  
16 The judge found no mitigating factors sufficiently substantial to call for leniency, and  
17 sentenced Petitioner to death for the murder conviction. The Arizona Supreme Court  
18 affirmed Petitioner's convictions and sentences. *Jones*, 188 Ariz. 388, 937 P.2d 310.  
19 Petitioner filed a petition for post-conviction relief ("PCR") with the trial court. After an  
20 evidentiary hearing, the PCR petition was denied in its entirety. (ROA-PCR 31.)<sup>3</sup> The  
21 Arizona Supreme Court summarily denied Petitioner's Petition for Review. (PR 7.)

22       Petitioner initiated this federal habeas proceeding on November 5, 2001 (Doc. 1),  
23 and filed an amended petition on December 23, 2002, raising 21 claims. (Doc. 58). In  
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25       <sup>3</sup> "ROA-PCR" refers to the docket numbers from the one-volume record on appeal  
26 from post-conviction proceedings prepared for Petitioner's petition for review to the  
27 Arizona Supreme Court (Case No. CR-01-0125-PC); "PR" refers to the docket numbers  
28 of documents filed at the Arizona Supreme Court for that petition for review proceeding.  
"RT" refers to the reporter's transcripts from Petitioner's state court proceedings. The  
state court original reporter's transcripts and certified copies of the trial and post-  
conviction records were provided to this Court by the Arizona Supreme Court on  
December 12, 2001. (Doc. 16.)

1 Claim 1D of the petition, he alleged, in part, that counsel was ineffective for:

- 2 1) failing to adequately investigate potential other suspects and crucial
- 3 witnesses; failing to raise legal challenges to eyewitness identifications; and
- 4 failing to adequately challenge blood-spatter testimony;
- 5 2) failing to hire a forensic pathologist to challenge the State's evidence
- 6 regarding the nature and timing of the victim's injuries; and
- 7 3) failing to have a qualified mental health expert examine Petitioner
- 8 before sentencing; failing to adequately explain the effect of Petitioner's
- 9 drug addiction to the sentencing court; and failing to investigate and present
- 10 mitigating evidence of Petitioner's social history.

11 (*Id.* at 37–96.) The parties briefed the claims (Docs. 69, 79) and motions for evidentiary  
 12 development (Docs. 89, 90, 101, 102, 108, 109, 113). Petitioner asserted PCR counsel's  
 13 ineffectiveness as cause to excuse the procedurally defaulted portion of Claim 1D. (Doc.  
 14 79, at 25, 60–62.) This Court determined, consistent with then-governing Supreme Court  
 15 precedent, *see Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991), that PCR counsel's  
 16 purported ineffectiveness did not constitute cause for the procedural default because  
 17 “there is no constitutional right to counsel in state PCR proceedings.” (Doc. 115, at 9–  
 18 11.) The Court ordered supplemental briefing regarding Petitioner's allegation that it  
 19 would be a fundamental miscarriage of justice not to review on the merits the entirety of  
 20 Claim 1D. (*Id.* at 40.) The Court denied relief on September 29, 2008, concluding that  
 21 Petitioner had not satisfied the fundamental miscarriage of justice standard to overcome  
 22 the default of Claim 1D. (Doc. 141 at 23.)

23 While Petitioner's appeal from this Court's denial of habeas relief was pending,  
 24 the Supreme Court decided *Martinez v. Ryan*, holding that where IAC claims must be  
 25 raised in an initial PCR proceeding, failure of counsel in that proceeding to raise a  
 26 substantial trial IAC claim may provide cause to excuse the procedural default of the  
 27 claim. 132 S. Ct. at 1320. Subsequently, Petitioner moved the Ninth Circuit to stay his  
 28 appeal and grant a limited remand in light of *Martinez*. The Ninth Circuit granted the  
 motion and remanded for reconsideration of Claim 1D, stating that “Claim 1D is for  
 purposes of remand substantial.” (Doc. 158) (citing *Martinez*, 132 S. Ct. 1309; *Trevino v.*  
*Thaler*, 133 S. Ct. 1911 (2013); *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc);

1 *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc)).

2 In September 2015, the parties completed supplemental briefing in this Court.

### 3 DISCUSSION

4 Petitioner seeks reconsideration based on *Martinez* for allegations in Claim 1D  
5 that trial counsel was ineffective for: (1) failing to investigate and present evidence to test  
6 the veracity or reliability of any of the State’s evidence, including the medical evidence  
7 and the question of the timeline between injury and death; and (2) failing to conduct a  
8 reasonably sufficient mitigation investigation for sentencing.<sup>4</sup>

9 To establish cause to excuse the default of Claim 1D, Petitioner argues that PCR  
10 counsel performed deficiently within the meaning of *Strickland v. Washington*, 466 U.S.  
11 668 (1984), when he failed to investigate and present a substantial claim that the guilt  
12 phase and sentencing phase performance of trial counsel was constitutionally deficient.  
13 (Doc. 167 at 141–156.) Respondents assert that Petitioner has not shown that PCR  
14 counsel was ineffective in failing to raise Claim 1D because PCR counsel raised multiple  
15 IAC claims and attempted to obtain additional resources. Respondents also argue that  
16 Claim 1D fails on the merits and therefore Petitioner cannot establish cause under  
17 *Martinez* because he was not prejudiced by PCR counsel’s performance as there was no  
18 “reasonable probability that, absent the deficient performance, the result of the post-  
19 conviction proceedings would have been different.” (Doc. 175 at 14) (quoting *Clabourne*  
20 *v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v.*  
21 *Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc)). After due consideration the Court  
22 finds that an evidentiary hearing is necessary to determine whether Petitioner can  
23 establish cause to excuse the procedural default of Claim 1D.

#### 24 I. Applicable Law

25 Because the doctrine of procedural default is based on comity, not jurisdiction,

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27 <sup>4</sup> Hereafter, the Court will refer to this portion of Claim 1D alleging trial counsel  
28 was ineffective for failing to investigate and present evidence in the guilt-phase and  
penalty-phase of trial as two separate sub-claims: “Claim 1D (Guilt Phase)” and “Claim  
1D (Penalty Phase),” respectively.

1 federal courts retain the power to consider the merits of procedurally defaulted claims.  
2 *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, habeas review of a defaulted  
3 claim is barred unless a petitioner “can demonstrate cause for the default and actual  
4 prejudice as a result of the alleged violation of federal law.” *Coleman v. Thompson*, 501  
5 U.S. 722, 750 (1991). Ordinarily, “cause” to excuse a default exists if a petitioner can  
6 demonstrate that “some objective factor external to the defense impeded counsel’s efforts  
7 to comply with the State’s procedural rule.” *Id.* at 753. In *Coleman*, the Court held that  
8 ineffective assistance of counsel in post-conviction proceedings does not establish cause  
9 for the procedural default of a claim. *Id.*

10 In *Martinez*, however, the Court established a “narrow exception” to the rule  
11 announced in *Coleman*. The Court explained:

12 Where, under state law, claims of ineffective assistance of trial counsel  
13 must be raised in an initial-review collateral proceeding, a procedural  
14 default will not bar a federal habeas court from hearing a substantial claim  
15 of ineffective assistance at trial if, in the initial-review collateral  
16 proceeding, there was no counsel or counsel in that proceeding was  
17 ineffective.

18 132 S. Ct. at 1320; *see also Trevino*, 133 S. Ct. at 1918 (noting that *Martinez* may apply  
19 to a procedurally defaulted trial-phase ineffective assistance of counsel claim if “the  
20 claim . . . was a ‘substantial’ claim [and] the ‘cause’ consisted of there being ‘no counsel’  
21 or only ‘ineffective’ counsel during the state collateral review proceeding”) (quoting  
22 *Martinez*, 132 S. Ct. at 1318–19, 1320–21).

23 Accordingly, under *Martinez*, a petitioner may establish cause for the procedural  
24 default of an ineffective assistance claim, “where the state (like Arizona) required the  
25 petitioner to raise that claim in collateral proceedings, by demonstrating two things: (1)  
26 ‘counsel in the initial-review collateral proceeding, where the claim should have been  
27 raised, was ineffective under the standards of *Strickland* . . . ,’ and (2) ‘the underlying  
28 ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the  
prisoner must demonstrate that the claim has some merit.’ ” *Cook v. Ryan*, 688 F.3d 598,  
607 (9th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1318); *see Clabourne*, 745 F.3d at

1 377; *Dickens*, 740 F.3d at 1319–20; *Detrich*, 740 F.3d at 1245.

2 In *Clabourne*, the Ninth Circuit summarized its *Martinez* analysis.<sup>5</sup> To  
3 demonstrate cause and prejudice sufficient to excuse the procedural default, a petitioner  
4 must make two showings.

5 First, to establish ‘cause,’ he must establish that his counsel in the state  
6 postconviction proceeding was ineffective under the standards of  
7 *Strickland*. *Strickland*, in turn, requires him to establish that both (a) post-  
8 conviction counsel’s performance was deficient, and (b) there was a  
reasonable probability that, absent the deficient performance, the result of  
the post-conviction proceedings would have been different.

9 *Clabourne*, 745 F.3d at 377 (citations omitted). Determining whether there was a  
10 reasonable probability of a different outcome “is necessarily connected to the strength of  
11 the argument that trial counsel’s assistance was ineffective.” *Id.* at 377–78. Second, “to  
12 establish ‘prejudice,’ the petitioner must establish that his “underlying ineffective-  
13 assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner  
14 must demonstrate that the claim has some merit.” *Id.*

15 Under *Martinez*, a claim is substantial if it meets the standard for issuing a  
16 certificate of appealability. *Martinez*, 132 S. Ct. at 1318–19 (citing *Miller-El v. Cockrell*,  
17 537 U.S. 322 (2003)). The United States Supreme Court has defined “substantial” as a  
18 claim that “has some merit.” *Martinez*, 132 S. Ct. at 1318. Stated inversely, a claim is  
19 “insubstantial” if “it does not have any merit or . . . is wholly without factual support.”  
20 *Martinez*, 132 S. Ct. at 1319.

21 Claims of ineffective assistance of counsel are governed by the principles set forth  
22 in *Strickland*, 466 U.S. at 674. To prevail under *Strickland*, a petitioner must show that  
23 counsel’s representation fell below an objective standard of reasonableness and that the  
24 deficiency prejudiced the defense. *Id.* at 687–88.

25 The inquiry under *Strickland* is highly deferential, and “every effort [must] be  
26 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of  
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28 <sup>5</sup> Though Petitioner and Respondents take issue with this methodology, both parties agree it is binding on this Court.

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir. 2010). To satisfy *Strickland*'s first prong, a defendant must overcome "the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* The court "cannot 'second-guess' counsel's decisions or view them under the 'fabled twenty-twenty vision of hindsight.'" *Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007) (quoting *LaGrand v. Stewart*, 133 F.3d 1253, 1271 (9th Cir. 1998)). "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998).

With respect to *Strickland*'s second prong, a petitioner must affirmatively prove prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

## **II. Claim 1D (Guilt Phase)**

Petitioner alleges his Sixth Amendment right to effective assistance of counsel was violated by trial counsels' failure to conduct a sufficient trial investigation and for inadequately investigating the police work, medical evidence, and timeline between Rachel's fatal injury and her death. Petitioner further alleges that post-conviction counsel performed deficiently within the meaning of *Strickland* when he failed to investigate and present this substantial IAC claim, thus excusing its procedural default.

### **A. Relevant Facts**

This Court previously summarized the facts relevant to Claim 1D (Guilt Phase) in its Order finding that Petitioner's new evidence was insufficient to demonstrate a



1 fundamental miscarriage of justice to excuse the procedural default of the claim.  
2 Therefore, most of the factual background, as well as much of the new evidence, set forth  
3 herein repeats what has previously been set out in the Court's September 2008 order  
4 addressing Claim 1D. (*See* Doc. 141 at 9–16.)

5 The main thrust of the prosecution's case against Petitioner had been that Rachel  
6 was solely in his care on the afternoon of May 1, 1994, when her injuries, including the  
7 fatal abdominal injury, were inflicted. The State argued that no other adult had the  
8 opportunity to inflict the injuries, which the experts deemed non-accidental. Petitioner's  
9 defense was that he had no motive to commit the crime, the evidence was all  
10 circumstantial, and the State failed to prove beyond a reasonable doubt that he had  
11 inflicted the injuries.

12 Rachel's body was examined by Steven Siefert, an emergency room doctor; by  
13 Sergeant Sonya Pesquiera of the Pima County Sheriff's Office; and by the medical  
14 examiner, John Howard. Dr. Siefert estimated that Rachel had been dead for two to three  
15 hours when she was brought to the hospital at 6:16 a.m. on May 2, 1994. (RT 4/6/95 at  
16 77, 80.) Rachel's body was covered with bruises and abrasions, primarily on the front of  
17 her body and across her face and forehead, but also on her back, arms, and legs. (*Id.* at  
18 81.)

19 Rachel had a large bruise on each side of her forehead, as well as intense  
20 coloration on the outer edge of her right eye and discoloration below the eyes. (*Id.* at 95–  
21 96.) Dr. Howard assessed the purple coloration on Rachel's face as injuries occurring  
22 probably one day prior to death, but there was also some green discoloration which  
23 would have been present for several days. (RT 4/12/95 at 116.) Rachel had a head  
24 laceration, above and behind her left ear, which was one inch long and went down to the  
25 skull bone; Dr. Howard assessed it as having been inflicted one to two days prior to  
26 death. (*Id.* at 116–17.) Rachel had bruising around the left side of her face and behind her  
27 ear, as well as bleeding into both ear drums, consistent with a slap or blow to the side of  
28 the head. (RT 4/6/95 at 90–91; RT 4/12/95 at 140–41.) Rachel also sustained internal



1 bleeding due to blunt force trauma to the back of her neck, as well as diffuse bleeding  
2 into the deep layers of her whole scalp. (RT 4/12/95 at 137–38.)

3 Rachel had four or five small bruises on her right forearm and several on her right  
4 hand, as well as six bruises on her left forearm and hand, injuries typically associated  
5 with trying to ward off an impact (defensive type wounds). (RT 4/6/95 at 85–87, 88–89;  
6 RT 4/12/95 at 39–40, 150–51.) Dr. Howard opined that the bruises and abrasions on her  
7 hand and arm were inflicted approximately one day prior to death. (RT 4/12/95 at 113–  
8 14.) This included swelling in her left middle finger that indicated injury to bone or  
9 ligaments; that injury would have been painful and noticeable within an hour of its  
10 infliction. (RT 4/6/95 at 89, 104–05; RT 4/12/95 at 114.) Dr. Howard identified abrasions  
11 and contusions on Rachel’s right and left thigh, both knees, and her right leg; they varied  
12 in appearance from less than a day old to approximately five days old. (RT 4/12/95 at  
13 113.) He indicated that much of the bruising on Rachel’s front side was consistent with  
14 having been inflicted by knuckles but he could not identify with any particularity what  
15 actually was used to inflict the injuries. (RT 4/12/95 at 126, 160.) Rachel had contusions  
16 and abrasions on her back, her buttocks, and on the back of her left thigh, which were  
17 inflicted within one to two days prior to her death. (*Id.* at 112; RT 4/6/95 at 93.) On her  
18 front torso, Rachel had 20 to 30 bruises, large areas of abrasions, and a red bruise area  
19 under her right arm. (RT 4/6/95 at 93–94; RT 4/12/95 at 115.) Some of these bruises were  
20 recent, within the prior day to two days, while others were of a coloration indicating an  
21 origin of several days prior to death. (RT 4/12/95 at 115.) There was a linear bruise  
22 pattern to the right of her navel; this injury was consistent with the pry bar found  
23 underneath the driver’s seat of Petitioner’s van but could have been caused by many  
24 different objects. (RT 4/12/95 at 78, 128, 160.)

25 Rachel had blunt force injuries to her labia, bruising and scrapes, and her vagina  
26 had a half-inch tear extending down from it. (*Id.* at 134.) The medical examiner  
27 determined that the injury to Rachel’s genitalia occurred about one day prior to her death.  
28 (*Id.* at 133.) These injuries were non-accidental, would have been painful, and were

1 consistent with penetration or attempted penetration. (*Id.* at 134–36.)

2 Internally, Rachel had sustained blunt force injury to her abdominal organs,  
3 causing a tear of the small bowel, and bruising of the tissues around the small bowel, the  
4 wall of the large bowel, and the attachments of the intestine to the back of the abdominal  
5 wall. (*Id.* at 141–42.) The rupture of her bowel caused inflammation and irritation of the  
6 lining of the abdominal tissues, a condition called peritonitis (*id.* at 145); when this type  
7 of damage is not repaired, it causes death over a period of hours to days (RT 4/6/95 at  
8 115). The amount of force required to rupture a healthy bowel is equivalent to a fall from  
9 more than two stories, an automobile accident at greater than 35 miles per hour, or a  
10 forceful directed blow to the abdomen (*id.* at 113–14; RT 4/12/95 at 151, 153–54); Dr.  
11 Siefert did not believe enough force for such an injury could be inflicted by a child under  
12 the age of six (RT 4/6/95 at 116). Rachel would have experienced pain at the time of the  
13 blunt force injury; Dr. Howard indicated she would then have had continual abdominal  
14 pain while Dr. Siefert stated that the pain might decrease initially, but wouldn't go away.  
15 (*Id.* at 119; RT 4/12/95 at 146.) Over the next several hours, a person with this condition  
16 would lose bowel function causing nausea, vomiting, and dehydration. (RT 4/6/95 at  
17 119–20; RT 4/12/95 at 146.) Dr. Howard opined that the injury was consistent with  
18 having occurred concurrent with many of her other injuries, approximately one day prior  
19 to death; he stated that the abdominal laceration could have occurred between 2:00 and  
20 6:00 p.m. on May 1. (RT 4/12/95 at 148–49.)

21 Dr. Siefert opined that Rachel's bruising would have begun to appear within a few  
22 hours of infliction, and he assessed that 95 percent of Rachel's injuries had occurred  
23 within 12 to 24 hours before her death. (RT 4/6/95 at 121, 128, 103–108, 111, 127; RT  
24 4/12/95 at 94.) Some of the bruises were a few days old, including the bruising beneath  
25 Rachel's eyes. (RT 4/6/95 at 103, 105, 111; RT 4/12/95 at 37.) Dr. Siefert thought some  
26 of the bruises and the head wound could have been incurred in a fall out of a van,  
27 however, he concluded that Rachel had incurred non-accidental trauma possibly at  
28 multiple times by multiple mechanisms. (RT 4/6/95 at 128–29, 135; RT 4/12/95 at 35.)

1 Similarly, the medical examiner explained that the number and multiple locations of the  
2 injuries were not consistent with a simple childhood accident, but were consistent with  
3 having been beaten. (RT 4/12/95 at 137.) He concluded that the injuries he assessed as  
4 being approximately one day old were consistent with having been inflicted between 2:00  
5 and 5:30 p.m. on May 1. (*Id.* at 117.) Dr. Howard determined that Rachel died of blunt  
6 abdominal trauma that caused a laceration of the small bowel and that it was a homicide.  
7 (*Id.* at 155.)

8 Joyce Richmond, a former girlfriend of Petitioner's, spent Saturday night, April  
9 30, with Petitioner until approximately 3:00 a.m. (RT 4/11/95 at 135–36.)

10 Rebecca Lux, Rachel's ten-year-old sister, testified that she had been living with  
11 Rachel, her brother, and her mom (Angela Gray) in Petitioner's trailer for a few months  
12 up to and including May 1. Petitioner never hit Rebecca, and she never saw him hurt  
13 Rachel or her brother. On Saturday night, April 30, Rachel seemed fine and ate dinner.  
14 On Sunday morning, May 1, Rebecca, Rachel, and their brother got up early, watched  
15 cartoons, and ate lunch until Petitioner got up around 2:30 or 3:00 p.m. She and her  
16 brother then asked if they could ride their bikes; later when she put her bike away to go to  
17 a friend's house she saw Petitioner and Rachel leave in Petitioner's van three times.  
18 Petitioner told her the first time they left that they were going to the store to get some  
19 things for dinner; Rachel looked fine after the first and second trip with Petitioner. The  
20 last time Petitioner and Rachel left, he told Rebecca they were going to his brother's  
21 house. When Rebecca got back from her friend's house around 6:00 or 7:00 p.m., Rachel  
22 was on the couch; she was pale, throwing up, her head was bleeding, and she had bruises  
23 on her face, hands, and fingers. Petitioner left for a time and when he returned, Rebecca's  
24 mother and Petitioner had an argument outside. At some earlier time while they were  
25 living with Petitioner, Rachel had acted scared of Petitioner and did not want to be near  
26 him. (RT 4/11/95 at 14–81.)

27 On May 1, the St. Charles family, who lived in a bus at a transient camp, got a  
28 visit from Petitioner around noon or thereafter; Ron St. Charles thought Petitioner

1 seemed angry. (RT 4/12/95 at 7–9, 17.) That same day, Petitioner’s neighbor at the  
2 Desert Vista trailer park, Michael Fleming, saw Rachel looking sick between 2:00 and  
3 5:00 p.m.; she was pale with dark circles under her eyes, and she looked wet and like she  
4 wanted to vomit, but he did not see any blood. (RT 4/7/95 at 164–66, 168, 171–73.)  
5 Petitioner, Angela Gray, and the children were supposed to attend Petitioner’s nephew’s  
6 birthday party on May 1, but they never showed up. (RT 4/11/95 at 119–24.)

7       On May 1, Norma Lopez sent her children Ray and Laura to the Choice Market on  
8 Benson Highway at three or four o’clock in the afternoon. When they returned, they told  
9 her they had seen a white man with messy brown hair driving a yellow van and hitting a  
10 little blond-haired girl in the face and chest and the girl was crying. The next day on the  
11 news Ms. Lopez heard that a man had been arrested in relation to the death of a little girl.  
12 When she had the children watch the news they identified that person as the man they had  
13 seen in the van. (RT 4/7/95 at 4–62.) Nine-year-old Ray Lopez indicated that he had gone  
14 to the Choice Market with his twin sister around 5:00 p.m. On the way home, he testified  
15 that he saw a white man with bushy hair driving by in a yellow van, hitting a little white  
16 girl in the chest with his fist and elbow. He did not see the driver’s face, only his hair  
17 from behind, but he identified a picture of Petitioner at trial. However, he stated that a  
18 photograph of Petitioner’s van was not the van he saw because the windows were  
19 different. (*Id.* at 4–32.) Ray’s sister, Laura Lopez, recalled going to Choice Market on a  
20 Sunday and on the way home seeing a white man driving a yellow van. She said the guy  
21 was ugly with puffy hair and he was hitting a little white girl on the left side of her face  
22 with his elbow and the girl was crying. Laura said she saw them through the front  
23 window of the van and could see part of the side of each of their faces. She remembered  
24 seeing the man from the van on the news that same day. (*Id.* at 32–46.)

25       Between 3:15 and 5:00 p.m. on May 1, 1994, Petitioner went into a Quik-Mart on  
26 Benson Highway. The store clerk testified that Petitioner got ice and that he was with a  
27 little girl who sat on a ledge outside the store. Although a lot of Rural Metro personnel  
28 regularly came into the Quik-Mart, the clerk did not notice an EMT treating the little girl

1 outside the store and believed she would have been aware if that had occurred. (RT  
2 4/7/95 at 142-149, 158-59). At trial, the State contended that Petitioner lied about having  
3 Rachel's head wound examined at the fire station by a paramedic. (RT 4/6/95 at 45-46.)  
4 Petitioner's counsel countered that Petitioner never said he went to the fire station but  
5 that a Rural Metro EMT who happened to be at the Quik-Mart had examined Rachel's  
6 head wound. (*Id.* at 71-72.)

7 On May 1, between 7:00 and 8:00 p.m., Richmond stopped by Petitioner's trailer  
8 and saw Rachel on the couch with a bleeding head; she said Rachel did not have bruises  
9 on her face or hands. (RT 4/11/95 at 141, 151-53.) Richmond's adult son was at  
10 Petitioner's trailer with his mother on the evening of May 1 and saw that Rachel's head  
11 was bleeding; he saw no bruising. When he asked, Petitioner stated that he had taken  
12 Rachel to the fire department. (*Id.* at 154-65.)

13 Rebecca woke early in the morning on May 2 and found Rachel in the bedroom  
14 doorway; she put her in bed. Rebecca next woke to her mother yelling, and Petitioner and  
15 her mother took Rachel to the hospital. (*Id.* at 52-54.) Petitioner took Rebecca and Brandi  
16 to the St. Charles's camp around 7:30 a.m. (*Id.* at 55-56, 143; RT 4/12/95 at 10-11.) Law  
17 enforcement located Petitioner at St. Charles's camp after 8:00 a.m. on May 2, 1994, and  
18 transported him to the Sheriff's Department. (RT 4/6/95 at 167,169, 172.) On the way  
19 there, Petitioner was upset, said there was something wrong with his little girl, and asked  
20 if they would take him to see her. (*Id.* at 173.)

21 Blood consistent with having come from Rachel was found on four pillowcases, a  
22 wash cloth, a comforter, and a bed sheet found in Petitioner's trailer; the fingertip area,  
23 the heel of the hand, and on one side of a glove found on the fence in front of Petitioner's  
24 trailer; a Circle K bag, carpet samples, and the front passenger seat's upholstery from  
25 Petitioner's van; and blue jeans worn by Petitioner at the time of his arrest. (RT 4/7/95 at  
26 85, 87-89, 107, 108-09, 118, 120-21, 126-27; RT 4/11/95 at 102-107, 109.) A substance  
27 consistent with vomit was found on Rachel's pajamas and a sleeping bag. (RT 4/11/95 at  
28 98-99.) There was a trace of blood not further identified on the red T-shirt and boots, but

1 not the denim jacket, worn by Petitioner at the time of his arrest; no blood was found on  
2 the tools from Petitioner's van. (*Id.* at 95, 100–01; RT 4/12/95 at 6 1–62.) On the van  
3 carpet between the seats, there appeared to be impression stains (caused by a bleeding  
4 wound resting against a surface) where blood had soaked through. On the van's  
5 passenger seat and some of the carpet there were spatter stains consistent with a person  
6 that has a bleeding injury being struck or shaken causing the blood to spatter out. (RT  
7 4/12/95 at 72-73.)

8 B. Analysis

9 Petitioner contends in Claim 1D (Guilt Phase) that counsel was ineffective for  
10 failing to conduct a sufficient trial investigation and for inadequately investigating the  
11 police work, medical evidence, and timeline between Rachel's fatal injury and her death.  
12 (Doc. 58 at 38–66.) Petitioner further contends the procedural default of this claim can be  
13 excused by the deficient performance of post-conviction counsel within the meaning of  
14 *Strickland* when he failed to investigate and present a substantial claim that the guilt-  
15 phase performance of trial counsel was constitutionally deficient. (Doc. 167 at 144–52.)

16 Because the Ninth Circuit has already found the remanded claims substantial,  
17 “prejudice” under *Martinez* has already been established. (*See* Doc. 158.) Thus, whether  
18 this Court can consider the merits of the underlying trial IAC claim turns on whether  
19 Petitioner has demonstrated “cause” to excuse the procedural default—that is, whether  
20 post-conviction counsel's performance was ineffective under *Strickland*. Determining  
21 whether the result of the PCR proceedings would have been different requires  
22 consideration of the underlying claim of trial counsel IAC, including whether trial  
23 counsel performed deficiently and whether there was a reasonable probability that the  
24 result of the trial would have been different. *Clabourne*, 745 F.3d at 382.

25 For the reasons discussed below, the Court cannot say based on the available  
26 record that Claim 1D (Guilt Phase) is plainly meritless or that there is no reasonable  
27 probability of a different outcome had PCR counsel presented Petitioner's guilt-phase  
28 IAC claim to the state court. Therefore, a hearing is necessary to allow Petitioner an

1 opportunity to demonstrate “cause”—whether PCR counsel was ineffective—under  
2 *Martinez*. See *Dickens*, 740 F.3d at 1321. Because determining whether there was a  
3 reasonable probability of a different outcome “is necessarily connected to the strength of  
4 the argument that trial counsel’s assistance was ineffective,” see *Clabourne*, 745 F.3d at  
5 377–78, this Court begins its analysis with a look at the strength of Petitioner’s guilt-  
6 phase IAC claim.

7 Petitioner’s primary argument is that trial counsel failed to conduct any  
8 investigation to assess the validity of the State’s evidence that Rachel suffered her fatal  
9 injury between 2:00 p.m. and 6:00 p.m. on Sunday, May 1, when it is undisputed that  
10 Rachel was principally in Petitioner’s care. Defense counsel’s theory at trial was that the  
11 State lacked proof that Petitioner murdered Rachel, and that there was no physical  
12 evidence tying Petitioner to the crime. (RT 4/6/95 at 58, 73.) Defense counsel presented  
13 no experts of his own, and conducted a weak cross-examination of the State’s experts in  
14 an attempt to support this argument. Defense counsel was able to establish, through cross  
15 examination of Dr. Siefert, that his examination of Rachel’s body was fairly cursory, and  
16 that her body did not look like it would have at the time of death. (*Id.* at 122, 126.) Dr.  
17 Siefert clarified on cross examination that the trauma that produced the majority of  
18 bruises would have occurred 12 to 24 hours before the time of death, but agreed that it  
19 could have taken several hours for them to actually appear as bruises, and that the  
20 appearance of bruises was dependent on many speculative factors. (*Id.* at 127–128.)  
21 Defense counsel also confirmed with Sergeant Pesqueira that the vast majority of bruises  
22 were caused within the same period of time. (4/12/95 at 94.) Defense counsel was able to  
23 elicit that Dr. Howard could not identify, with particularity, the instrument that inflicted  
24 Rachel’s injuries. (*Id.* at 160.) Sergeant Pesquiera confirmed that numerous objects could  
25 have caused the abdominal injury, not just the pry bar. (*Id.* at 89.) Defense counsel was  
26 also able to establish that even though Rachel appeared to have injuries that could have  
27 been scratches, no fingernail scrapings were taken from Petitioner. (*Id.* at 91, 160.)  
28 Critically, defense counsel did not challenge any of the State’s experts’ conclusions



1 regarding the timing of Rachel's fatal injuries. Petitioner contends that forensic evidence  
2 was vital to proving the State's case against Petitioner, and that it was equally vital for  
3 defense counsel to understand that scientific evidence and be prepared to challenge it.

4 Petitioner contends that counsel was put on notice for the need to further  
5 investigate by: (1) their own independently hired investigator, who, after conducting an  
6 initial investigation, informed counsel that he believed Petitioner was innocent and  
7 requested additional funds to further the investigation (*see* Doc. 167, Ex. 34 at ¶ 6.); (2)  
8 Dr. Howard's pre-trial interview in which he disclosed that he found "microscopic"  
9 evidence to put the time of Rachel's scalp injury as "probably two days old" and perhaps  
10 "72 hours and older" (*see* Doc. 167, Ex. 11 at 4, 9) and his testimony at Angela Gray's  
11 trial which described the autopsy chemistries for both the small bowel and vaginal  
12 injuries as most consistent with infliction 24 hours prior to death (*see* Doc. 96, Ex. 9, RT  
13 3/28/95 at 99–101); and (3) pre-trial interviews and testimony from Rebecca that  
14 Petitioner had only taken two trips with Rachel in his van, and appeared fine after each  
15 trip (*see* Doc. 167, Ex. 17 at 6–7; Ex. 18 at 11–12; Doc. 96, Ex. 9, RT 3/24/95 at 69–71).

16 Had counsel retained forensics experts and investigated the State's "time of  
17 injury" evidence, Petitioner contends he would have uncovered proof that Rachel's  
18 injuries could not have been inflicted any time on May 1. Petitioner asserts that there is  
19 no reliable scientific evidence to support the conclusion that any of Rachel's injuries  
20 were inflicted on the afternoon of May 1, 1994.<sup>6</sup> Petitioner's support for this argument  
21 comes principally from three sources: declarations and reports from Dr. Janice Ophoven,  
22 a forensic pathologist, and Dr. Mary Pat McKay, an emergency medicine physician,  
23

24  
25 <sup>6</sup> In addition to failing to investigate and challenge the State's "time of injury"  
26 evidence, Petitioner also alleges that trial counsel and PCR counsel failed to investigate  
27 and challenge additional evidence and testimony elicited by the State during Petitioner's  
28 trial in support of his conviction, such as blood evidence and eyewitnesses statements.  
Because the Ninth Circuit has already determined that Petitioner's claim is substantial,  
and this Court has determined that Petitioner's claim is not plainly meritless based on the  
"time of injury" evidence, the Court does not summarize this additional evidence at this  
time.

1 specializing in trauma care (Doc. 167, Exs. 3, 9), and Dr. Howard's testimony from  
2 Angela Gray's trial (Doc. 96, Ex. 9).

3       Petitioner submits a declaration and three supplemental reports by Dr. Janice  
4 Ophoven. (Doc. 167, Exs. 4–7.) Dr. Ophoven reports that Rachel “died from a ruptured  
5 duodenum with subsequent severe dehydration, shock and eventually peritonitis.” (*Id.*,  
6 Ex. 6 at 3.) Dr. Ophoven explains that, although the initial injury is painful, there can be a  
7 recovery from this initial pain within a few hours, and a lack of obvious symptoms  
8 thereafter. (*Id.*) A child can be “up and around, able to walk, talk and most importantly  
9 drink” with waxing and waning symptoms “until the child slips into a coma.” (*Id.*) For  
10 this reason, the diagnosis may be delayed for four or five days. (*Id.*) Based on Rachel's  
11 post-mortem abnormal chemistries, which showed a diagnostic pattern of dehydration,  
12 and her significantly decreased weight, Dr. Ophoven opined that Rachel's bowel  
13 laceration had to be present more than 24 hours, and possibly longer than 48 hours prior  
14 to her death. (*Id.*, Ex. 7 at 1.) Dr. Ophoven concluded that “[t]he evidence shows that the  
15 fatal injuries to Rachel Gray could not possibly have been inflicted on the day prior to her  
16 death” and that the “veracity of this evidence is as scientifically precise as any forensic  
17 determination available in medical science.” (*Id.* at 2) (emphasis omitted). Further, she  
18 concluded that the abdominal injury was inflicted significantly earlier than Rachel's  
19 vaginal injuries, perhaps even days prior. (*Id.*, Ex. 6 at 3.) More recently, Dr. Ophoven  
20 has concluded that the vaginal injury itself did not occur in the few days prior to her  
21 death, (*id.*, Ex. 7 at 1), and that “the visual determination of the age of any bruise is  
22 scientifically unreliable” (*id.* at 3). Finally, she stated that Rachel was subjected to  
23 “multiple episodes of inflicted injury,” and opined that Rachel's growth history and  
24 multiple bruises were “consistent with a diagnosis of a chronically abused child.” (*Id.*,  
25 Ex. 6 at 4.)

26       At the request of Petitioner, Dr. McKay reviewed Rachel's case record and  
27 medical reports to provide an opinion on the nature of her injuries and their potential  
28 etiology as well as the timeline from injury to the appearance of symptoms to death.

1 (Doc. 167, Ex. 10-B at 1.) Additionally, Dr. McKay performed a review of the literature  
2 and identified at least 160 cases of duodenal perforation in children where the timeline  
3 was described from injury through diagnosis, treatment, and outcome. (*Id.*) Dr. McKay  
4 explained that, following injury, digestive fluids and food enter the duodenum leak into  
5 the retroperitoneal space, causing an inflammatory reaction. (*Id.* at 3.) Initially there is  
6 pain when the injury occurs, but it may not be significant immediately after that. (*Id.*) As  
7 time progresses, adjacent tissues become inflamed, and this continues into peritonitis.  
8 (*Id.*) At this time the child's pain will begin to increase and may be quite exquisite, the  
9 child will complain and begin to vomit, and ultimately the inflammatory response  
10 progresses and becomes systemic and the body begins to shut down. (*Id.*) The child  
11 becomes lethargic, then somnolent, and finally breathing slows and the heart stops. (*Id.*)  
12 The progression from injury to death in Rachel's case required a significant amount of  
13 time, though the exact timing in Rachel's case is not clear. (*Id.*) Dr. McKay found several  
14 cases in her literature review where the diagnosis was delayed as long as four to seven  
15 days, but even then, with appropriate treatment, the child survived. (*Id.*) Dr. McKay was  
16 unable to find any cases of death from an isolated duodenal laceration where death  
17 resulted in less than 48 hours, and found nothing in Rachel's medical history to suggest  
18 she was somehow more susceptible to early death from this injury. (*Id.*) Dr. McKay did  
19 note that it was likely that Rachel was underfed, but that nothing in the autopsy findings  
20 or photos suggests she was severely malnourished. (*Id.* at 4.) In Dr. McKay's opinion,  
21 Rachel's duodenal injury occurred no sooner than 36 hours prior to death and likely  
22 occurred much earlier. (*Id.* at 5.)

23 Dr. Howard, the medical examiner who testified at trial, submitted a 2004  
24 declaration, in which he indicated that the laceration of Rachel's bowel could have  
25 occurred greater than 24 hours before her death, perhaps longer than 48 hours, as delayed  
26 onset of symptoms is possible with this type of injury. (Doc. 167, Ex. 1 at 1–2.) Further,  
27 Dr. Howard stated that the "injuries to Rachel Gray's vaginal area showed characteristics  
28 consistent with hours to perhaps days elapsing between the time of her abdominal injury

1 and her vaginal injury.” (*Id.* at 3.) Similarly, Dr. Howard attested that the older bruises on  
2 Rachel’s body “could have been consistent with the blunt force trauma to Rachel Gray’s  
3 abdomen.” (*Id.*) Petitioner asserts that the testimony of Dr. Howard at Angela Gray’s trial  
4 demonstrates that Dr. Howard intentionally concealed two critical facts at Petitioner’s  
5 trial. First, Dr. Howard testified in Angela Gray’s trial that the least amount of time that it  
6 would take from the injury until the time of death was 12 hours. (Doc. 96, Ex. 9 at 100.)  
7 Petitioner asserts this testimony calls into question his testimony at Petitioner’s trial, that  
8 the injury could have been inflicted during the hours between 2:00 and 6:00 pm. Second,  
9 Petitioner asserts that Dr. Howard concealed that his findings at autopsy were that the  
10 fatal injury was “most consistent” with one that was inflicted at least 24 hours prior to  
11 death; which proves that the injury could not have been inflicted during the afternoon of  
12 May 1. (*See* Doc. 96, Ex. 9, RT 3/28/95 at 101.)

13 The Court disagrees with this characterization of Dr. Howard’s testimony. As  
14 previously noted, Dr. Howard has not retracted his testimony that the abdominal injury  
15 could have occurred on Sunday afternoon while Rachel was with Petitioner, or “any time  
16 on the 24 hours prior” to May 2. (RT 4/12/95 at 148; *see also* Doc. 141 at 17.)  
17 Nonetheless, as discussed below, the reports of Drs. Ophoven and McKay establish a  
18 colorable claim of IAC.

19 This Court previously analyzed much of the same new evidence Petitioner  
20 presents in his *Martinez* brief, and found that Petitioner failed to establish a fundamental  
21 miscarriage of justice under the “exacting” standard of an actual innocence gateway  
22 claim.<sup>7</sup> (Doc. 141 at 18.) Specifically, this Court found Dr. Ophoven’s testimony was  
23 “not enough to demonstrate that no reasonable juror would have found Petitioner guilty  
24 beyond a reasonable doubt” because it did not “seriously call into question the jury’s  
25 verdict.” (*Id.*) Nonetheless, this Court did state that Dr. Ophoven’s testimony was

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26  
27 <sup>7</sup> To demonstrate a fundamental miscarriage of justice based on factual innocence  
28 of the murder, the petitioner must show that “a constitutional violation has probably  
resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298,  
327 (1995).

1 “compelling and may have been persuasive to some jurors in the first instance.” (*Id.* at  
2 22.) Moreover, Petitioner has now presented additional evidence that Rachel’s vaginal  
3 injury was not inflicted on May 1, and that the reliability of dating injuries from  
4 bruises—a premise on which Dr. Siefert based his opinion that 95 percent of Rachel’s  
5 injuries occurred on May 1—is scientifically unreliable. These facts, if true, challenge  
6 this Court’s previous conclusion that “Dr. Ophoven does not call into question the trial  
7 testimony regarding the time-frame for Rachel’s other non-fatal injuries—within one day  
8 of her death.” (*See* Doc. 141 at 18.) These facts also make Petitioner’s theory more, not  
9 less, plausible because a juror would not have to believe, as this Court previously found,  
10 “that at least two days before her death someone inflicted a fatal abdominal injury on  
11 Rachel (and she did not tell anyone) and that the following day she received additional  
12 serious injuries and extensive diffuse bruising during the time she was with Petitioner”  
13 (*Id.*).

14 Furthermore, in order to allege a colorable claim entitling Petitioner to an  
15 evidentiary hearing on this matter Petitioner must now meet a less demanding standard—  
16 he must allege facts that, if proven true, would “show that there was a reasonable  
17 probability that . . . the result of the proceeding would have been different. A reasonable  
18 probability is a probability sufficient to undermine confidence in the outcome.”  
19 *Strickland*, 466 U.S. at 694.

20 The Court finds that Petitioner has alleged facts, that, if true, could prove that  
21 Rachel’s fatal injury could not have been inflicted during the afternoon of May 1, and call  
22 into question the evidence that the majority of Rachel’s other injuries, including her  
23 vaginal injury, occurred on May 1. This significantly discounts a central premise the  
24 State relied on in arguing Petitioner’s guilt, and establishes a reasonable probability of a  
25 different outcome during the guilt phase of Petitioner’s trial had this evidence been  
26 presented.

27 Petitioner asserts that PCR counsel was also ineffective because, despite being on  
28 notice that trial counsel failed to conduct a reasonable investigation, he also failed to

1 conduct any outside investigation of Petitioner's case, performing only one read through  
2 of the file and failing to obtain funds for further investigation because he misunderstood  
3 the standards governing application of Arizona's indigent defense investigative assistance  
4 statute. Respondents argue that PCR counsel raised several IAC claims in Petitioner's  
5 PCR petition, and was granted an evidentiary hearing on several of those claims.  
6 Respondents assert that PCR counsel is not required to raise every non-frivolous issue,  
7 but can decide which issues to raise, and this Court should presume counsel reasonably  
8 omitted Claim 1D because it is not stronger than the claims PCR counsel presented. (Doc.  
9 175 at 13) (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Respondents'  
10 presumption, however, is not supported by the record. Petitioner has alleged facts that  
11 suggest that PCR counsel performed deficiently by failing to conduct any investigation of  
12 prior counsels' representation. PCR counsel's billing records provide factual support that  
13 PCR counsel only reviewed the record in this case, and conducted no outside  
14 investigation, despite being on notice, for the same reasons discussed above in regards to  
15 trial counsel, that further investigation may have been necessary to make an informed,  
16 strategic choice. (See Doc. 167, Ex. 39.) These facts demonstrating the lack of any  
17 serious investigation into trial counsel's performance suggest that PCR counsel may not  
18 have conducted a strategic "winnowing" of claims, but may have failed to conduct a  
19 reasonable investigation in the first instance. See *Strickland*, 466 U.S. at 690–91  
20 ("[S]trategic choices made after less than complete investigation are reasonable precisely  
21 to the extent that reasonable professional judgments support the limitations on  
22 investigation.")

23 Respondents also assert that because Claim 1D fails on the merits, raising the  
24 claim would not have affected the PCR proceeding's outcome. Thus, Respondents  
25 conclude, even if PCR counsel performed deficiently, Petitioner has failed to establish  
26 cause under *Martinez* because there is "no reasonable probability that, absent the  
27 deficient performance, the result of the post-conviction proceedings would have been  
28 different." The Court disagrees. First, as explained above, Petitioner's claim is not plainly

1 meritless. In weighing the strength of Petitioner’s trial counsel IAC claim, prejudice to  
 2 the outcome of the PCR proceedings has been sufficiently alleged so as to mandate a  
 3 hearing.

4 In conclusion, Petitioner has alleged a substantial claim of trial counsel  
 5 ineffectiveness, thereby demonstrating “prejudice” under *Martinez*. Petitioner’s claim is  
 6 not plainly meritless. Because it is unclear from the record whether PCR counsel was  
 7 ineffective under *Strickland* for failing to raise the claim in state court, a hearing is  
 8 necessary to determine whether PCR counsel acted deficiently and whether there is a  
 9 reasonable probability the result of the PCR proceedings would have been different.  
 10 Assessing the latter will necessarily entail considering the strength of the defaulted IAC  
 11 claim. *Clabourne*, 745 F.3d at 377–78.

### 12 **III. Claim 1D – (Penalty Phase)**

13 Petitioner alleges his Sixth Amendment right to effective assistance of counsel  
 14 was violated by trial counsel’s failure to conduct a sufficient mitigation investigation for  
 15 sentencing. Petitioner further alleges that post-conviction counsel performed deficiently  
 16 within the meaning of *Strickland* when he failed to investigate and present a substantial  
 17 claim that the penalty-phase performance of trial counsel was constitutionally deficient,  
 18 thus excusing the procedural default of this claim.

#### 19 A. Relevant Facts

20 Following Petitioner’s conviction, the trial court held an aggravation/mitigation  
 21 hearing. Defense counsel presented testimony from a psychologist and six lay witnesses  
 22 in an effort to establish both statutory and non-statutory mitigating factors. Dr. Joseph  
 23 Geffen, a psychologist, conducted a mental health evaluation of Petitioner. (RT 6/13/95  
 24 at 75.) In preparation for the evaluation Dr. Geffen reviewed materials from Kino  
 25 Community Hospital, the Pima County Jail, Vision Quest, and Southern Arizona Mental  
 26 Health Center (“SAMHC”), and videotaped statements made by Petitioner to the police.  
 27 (*Id.* at 75–79.) Dr. Geffen first discussed the kind of discipline Petitioner received as a  
 28 child. Petitioner’s mother, who had “involved herself in drinking alcohol” and found it



1 “extremely difficult to discipline” her children, administered “whoopings” to Petitioner.  
2 (*Id.* at 80–81.) Dr. Geffen reported Petitioner tended to minimize this experience by  
3 stating that it wasn’t abuse because he “deserved them.” (*Id.*) Dr. Geffen explained that  
4 the kind of physical abuse a child receives has an influence on the way that child will  
5 relate to other people when they are adults. (*Id.* at 81–82.) Dr. Geffen also related that  
6 after Petitioner’s father died when Petitioner was 11 or 12 years old, he began getting into  
7 trouble. (*Id.* at 82.) Dr. Geffen explained that the death of a father at that age would have  
8 a serious effect on a child in terms of how that child adjusted to the loss and how the  
9 child functions at school, at home, and in relating to other people as an adolescent or as  
10 an adult. (*Id.*)

11 After his father’s death, Petitioner was referred to “Vision Quest,” a juvenile  
12 program, for his incorrigible behavior. (*Id.* at 83.) Dr. Geffen opined that the conclusions  
13 he made based on his observations of Petitioner were compatible with those described by  
14 a doctor at Vision Quest—Petitioner appeared to have a very low frustration tolerance,  
15 was quite impulsive, lacked self-confidence, and had a poor self-image. (*Id.* at 83.) This  
16 lack of impulse control, Dr. Geffen concluded, could lead to some “fairly serious  
17 problems.” (*Id.* at 84.) Dr. Geffen explained that he would expect a youth with  
18 Petitioner’s problems to display anger and aggressiveness, and to have substance abuse  
19 issues. (*Id.* at 84.) Petitioner turned to substance abuse because he had not learned or been  
20 taught socially acceptable ways to deal with difficult feelings, emotions, thoughts, and  
21 ideas. (*Id.* at 85.)

22 Next, Dr. Geffen discussed an incident that occurred in 1992, in which Petitioner  
23 was referred to SAMHC for treatment after he put a gun to his head and threatened to kill  
24 himself and others, was abusing drugs very seriously, particularly cocaine and  
25 amphetamines, and had become mentally and emotionally disorganized, confused,  
26 depressed, and angry. (RT 6/13/95 at 86–87, 102.) Petitioner was referred to SAMHC for  
27 treatment; while there he exhibited similar problems to those documented at Vision  
28 Quest, only more severe. (*Id.* at 86.) Petitioner was discharged after a few sessions

1 because he did not want to comply with the recommendation that he participate in a  
2 substance abuse program. (*Id.* at 88.)

3 Petitioner related to Dr. Geffen that he had been using amphetamines heavily in  
4 the six months prior to the murder. (*Id.* at 88–89.) Dr. Geffen explained that amphetamine  
5 use arouses physical and mental activity—predominantly uncontrollable, agitated,  
6 aggressive, and violent behavior. (*Id.* at 89.) Additionally, amphetamine use often  
7 corresponds to extended periods of little to no sleep, which contributes to loss of control,  
8 confusion, irritability, and overreacting to situations with aggression. (*Id.* at 90.)

9 Petitioner reported numerous head injuries to Dr. Geffen, including an incident  
10 where he lost consciousness after being hit in the head with a brick. (*Id.* at 90–91.) Dr.  
11 Geffen explained that head injuries can exacerbate problems a person has, making them  
12 more vulnerable to situational stress, drugs, or anything requiring the ability to think,  
13 reflect and to inhibit certain behaviors. (*Id.* at 91.) These deficits in so-called “executive”  
14 or “higher” brain function can occur with or without demonstrable cognitive impairment.  
15 (*Id.* at 92.)

16 Dr. Geffen noted that while incarcerated, Petitioner was receiving an antipsychotic  
17 medication, used primarily in cases where a person is agitated and possibly having  
18 psychotic thoughts. (*Id.* at 92–93.) Petitioner received the medication because he was  
19 quite agitated, difficult to manage, and was expressing feelings of suicide and homicide.  
20 (*Id.* at 95–96.)

21 Dr. Geffen concluded that Petitioner has “several problems,” and one way they  
22 manifest themselves is in antisocial behavior. (*Id.* at 96.) Dr. Geffen testified that  
23 Petitioner’s mental health problems originated at about the time of the loss of his father.  
24 (*Id.* at 97.) Without a very clear adult authority model, he used drugs and sought  
25 acceptance and “good feelings” from his peers, the effect of which was “ruinous in terms  
26 of his self-esteem in terms of him just plain simply learning adaptive mechanisms to be  
27 able to survive in society and be a successful citizen.” (*Id.*) Petitioner’s prolonged use of  
28 substances “generated new problems” in terms of preventing him from learning how to

1 solve problems, cope with difficult situations, and deal with strong emotions properly.  
2 (*Id.* at 97–98.) Though he concluded that Petitioner was legally sane, Dr. Geffen believed  
3 that Petitioner was unable to apply right and wrong the way a normal person would. (*Id.*  
4 at 98.) In other words, “he should not have been expected nor is he capable of functioning  
5 normally in conforming to society.” (*Id.* at 99.)

6 Defense counsel presented testimony from Ronny Higgins, a former  
7 methamphetamine user and a resident and substance abuse counselor at Amity House, a  
8 drug treatment program. (RT 6/13/95 at 127–28, 136.) Higgins spoke with Petitioner in  
9 an effort to determine if Petitioner was truly a methamphetamine user. (*Id.* at 129.) After  
10 speaking with Petitioner, Higgins concluded that he was a heavy methamphetamine user  
11 and addict, to the extent he would go on week-long “runs,” where he used  
12 methamphetamine for a period of up to six days without sleep. (*Id.* at 130.) Higgins  
13 opined that if Petitioner slept for approximately 18 hours just prior to the murder, that  
14 indicated he was just coming down off of a run, and had probably used within 26 hours.  
15 (*Id.* at 131.) In Higgins’ experience, a person coming down off of a run is very irritable,  
16 aggressive and violent. (*Id.* at 132–33.) Higgins believed it was not realistic to expect  
17 someone to stop using methamphetamine without support. (*Id.* at 135.)

18 Counsel presented testimony from Florence Jones, Petitioner’s mother. Florence  
19 had an older son from a previous marriage, and had three sons, including Petitioner’s  
20 twin, Larry, with her second husband. (RT 6/13/95 at 47–48, 59.) The marriage had its  
21 “ups and downs”; Florence recalled two “pretty bad fights” with her husband in front of  
22 the kids and recalled that one time, after her husband came home drunk, she stabbed him  
23 in the back with a paring knife. (*Id.* at 158–59.)

24 Of the twins, Petitioner developed normally and was the “happy-go-lucky” child,  
25 while Larry was “a little more serious.” (*Id.* at 52–53.) As a young child, Petitioner  
26 received average grades, was never tested to see if he had any kind of learning problem,  
27 and behaved appropriately at school. (*Id.* at 55–56.) Florence was responsible for  
28 disciplining the children, and would use a switch or belt to give spankings or whippings a

1 “[c]ouple of times a month” and smacked the children “occasionally.” (*Id.* at 60–61.)  
2 When Petitioner was 11 or 12 the family moved from Georgia to Arizona, and at that  
3 time Petitioner started getting into trouble at school. (*Id.* at 64, 66.) Florence continued to  
4 punish Petitioner by taking away privileges and hitting or whipping him when he needed  
5 it. (*Id.* at 66.) Florence did not recall Petitioner ever suffering any kind of head injury or  
6 being knocked unconscious. (*Id.* at 70.) The school recommended mental health services  
7 for Petitioner, but his father did not permit him to see anyone. (*Id.*)

8 When Petitioner’s father’s health began to decline, Petitioner started doing poorly  
9 in school. (RT 6/13/95 at 142.) Florence started receiving reports of serious problems a  
10 few months after Petitioner’s father died, when Petitioner was about 15 years old. (*Id.* at  
11 141, 143.) She became aware of Petitioner’s use of marijuana around the same time.  
12 Florence did not recall any indication that Petitioner had any mental problems, but at the  
13 time she was drinking excessively. (*Id.* at 146.) Shortly after that he was sent to Vision  
14 Quest because he wouldn’t mind and was getting into trouble with the police. (*Id.* at 143–  
15 44.)

16 After Petitioner left Vision Quest, at age 18, he lived on his own and was able to  
17 maintain a job “[o]ff and on.” (RT 6/15/95 at 150.) In 1986 he married Carol, the father  
18 of his two children. (*Id.* at 153.) The couple lived with Florence for a time when Carol  
19 was first pregnant, and moved out when his daughter was three years old. (*Id.* at 154.)  
20 During the time Petitioner was with Carol, Florence did not notice that he had any  
21 problems and heard no complaints of domestic violence. (*Id.* at 154.) Petitioner did use  
22 marijuana, but it made him calmer. (*Id.* at 155.) Florence did not recall seeing Petitioner  
23 spank or act inappropriately with the children, and had never heard that Petitioner was  
24 mistreating anyone in his family. (*Id.* at 163.) At some point, the couple separated  
25 because Petitioner was having relations with other women; Carol took the children and  
26 Petitioner “more or less went crazy.” (*Id.* at 157–58, 161.)

27 Deborah Wheeler, a detention officer for the Maricopa County Sheriff’s  
28 Department, was married to Petitioner’s older brother Otis and met Petitioner around

1 1977. (*Id.* at 170–71.) Although most of Wheeler’s relationship with Petitioner was  
2 before he became a father, Wheeler had an opportunity to observe Petitioner with his  
3 children, and described him as a very good father. (*Id.* at 172–73.) Petitioner had a good  
4 relationship with Wheeler’s children, and was very respectful around Wheeler. (*Id.* at  
5 174.)

6 Dennis Hatt, a mechanic and former manager at a Chevron station where  
7 Petitioner worked for a year and a half, testified that Petitioner was a good, dependable,  
8 and respectful employee. (RT 6/13/95 at 15–17.)

9 Petitioner’s girlfriend, Joyce Richmond, and her teenage daughter, lived with  
10 Petitioner and his daughter in his trailer on Benson Highway for approximately a year.  
11 (*Id.* at 178–81.) She moved out approximately three to four months before he was  
12 arrested. (*Id.* at 180.) Petitioner had responsibility for disciplining both girls when they  
13 were together. (*Id.* at 181.) The harshest discipline he handed out was to ground them to  
14 their rooms for 15 minutes. (*Id.* at 181–82.) Petitioner never hit or treated either girl  
15 inappropriately. (*Id.* at 182.) Richmond was aware that Petitioner was using  
16 methamphetamine during the time they were together. When he used he would stay up  
17 for three or four nights in a row, then sleep all night and most of the day. (*Id.* at 183–84.)  
18 When Petitioner was using, Richmond didn’t notice any change in his behavior; he had a  
19 lot of hobbies and home projects he would do all night long, but he was never mean. (*Id.*  
20 at 185–186.) She saw him using methamphetamine on Saturday night prior to the murder.  
21 (*Id.* at 188.) She knew he had methamphetamine on Friday night, but couldn’t tell if he  
22 was using it because, other than sleeping, he never acted any different when he was  
23 using. (*Id.* at 189.)

24 LeAnne Jones, Petitioner’s sister-in-law, met Petitioner when she worked at a  
25 Chevron station where Larry worked. (*Id.* at 193–94.) Petitioner and his daughter lived  
26 with LeAnne and Larry, and LeAnne’s two daughters, ages seven and nine, from  
27 approximately late 1992 to early 1994. (*Id.* at 195–96.) When he disciplined any of the  
28 children he would yell at them to behave, or talk to them. (*Id.* at 197–98.) He never

1 spanked the children, and they never complained that he was inappropriate with them.  
2 (*Id.* at 198.) LeAnne was aware that Petitioner used methamphetamine; when he did he  
3 seemed more “antsy, busy. In a hurry.” (*Id.* at 202–03.) He would sit and “mess with his  
4 keys and locks and stuff” or play Nintendo for three or four days in a row. (*Id.* at 203.)  
5 On the Saturday before the murder, Petitioner and Ron St. Charles had stopped by  
6 LeAnne’s house in the afternoon to use methamphetamine. (*Id.* at 207–08.)

7 B. Analysis

8 Petitioner contends in Claim 1D (Penalty Phase) that counsel was ineffective at  
9 sentencing for failing to investigate and present reasonably available and compelling  
10 mitigation evidence. (Doc. 58 at 66–96.) Petitioner asserts that, but for counsel’s failure  
11 to investigate Petitioner’s mitigation, a substantial body of mitigating evidence could  
12 have been presented to the sentencing court in order to provide a complete picture of  
13 Petitioner’s troubled childhood, mental impairments, and battle with addiction. (Doc. 167  
14 at 111.) Petitioner further contends that post-conviction counsel performed deficiently  
15 within the meaning of *Strickland* when he failed to investigate and present a substantial  
16 claim that the penalty-phase performance of trial counsel was constitutionally deficient.  
17 (*Id.* at 152–155.)

18 Because the Ninth Circuit has already found the remanded claims substantial,  
19 “prejudice” under *Martinez* has been established. (*See* Doc. 158.) Thus, whether this  
20 Court can consider the merits of the underlying trial IAC claim turns on whether  
21 Petitioner has demonstrated “cause” to excuse the procedural default—that is, whether  
22 post-conviction counsel’s performance was ineffective under *Strickland*. The Court  
23 concludes that Petitioner’s underlying IAC claim does have some factual support, and its  
24 proper outcome is sufficiently debatable at this stage to warrant further proceedings.  
25 Because the Court cannot say based on the available record that Claim 1D (Penalty  
26 Phase) is plainly meritless or that there is no reasonable probability of a different  
27 outcome had PCR counsel presented Petitioner’s penalty-phase IAC claim to the state  
28 court, it determines that a hearing is necessary to allow Petitioner to demonstrate “cause”

1 under *Martinez*. See *Dickens*, 740 F.3d at 1321.

2 “Counsel have a duty to make a reasonable investigation such that they are able to  
3 make informed decisions about how best to represent their clients,” *Caro v. Calderon*,  
4 165 F.3d 1223, 1227 (9th Cir. 1999), and are tasked with attempting to discover ““all  
5 reasonably available mitigating evidence and evidence to rebut any aggravating evidence  
6 that may be introduced by the prosecutor.”” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)  
7 (emphasis in original) (quoting ABA Guidelines for the Appointment and Performance of  
8 Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989)); see also *Caro*, 165 F.3d at 1227  
9 (“It is imperative that all relevant mitigating information be unearthed for consideration  
10 at the capital sentencing phase.”). The failure to investigate a defendant’s organic brain  
11 damage or other mental impairments may constitute ineffective assistance of counsel. See  
12 *Caro*, 165 F.3d at 1226. Petitioner asserts that a proper investigation by trial counsel  
13 would have revealed a substantial body of mitigating evidence that could have been  
14 presented to the sentencing court in order to provide a complete picture of Petitioner’s  
15 mental impairments, difficult childhood, and drug addiction.

16 In support of his contention that trial counsel inadequately investigated  
17 Petitioner’s mental impairments, he proffers new evidence from Dr. Alan Goldberg, a  
18 neuropsychologist, and Dr. Pamela Blake, a neurologist. (Doc. 167, Exs. 42–43.) Dr.  
19 Goldberg conducted a neuropsychological evaluation of Petitioner and reported  
20 abnormalities of frontal lobe brain function and right hemisphere motor and sensory  
21 function, evidence of a seizure disorder, and Attention Deficit Disorder. (Doc. 167, at  
22 112, *id.*, Ex. 42.) Dr. Goldberg recommended a full neurological and psychiatric  
23 evaluation. (Doc. 167, Exhibit 42 at 8.)

24 Dr. Blake performed a neurological evaluation of Petitioner. She stated that many  
25 of Petitioner’s behavioral traits “can be attributed to a certain pattern of neurologic  
26 dysfunction.” (Doc. 167, Ex. 43 at 10.) Dr. Blake also noted indications of frontal lobe  
27 damage. (*Id.* at 11.) She concluded that Petitioner “almost certainly would have fulfilled  
28 the diagnostic criteria for Attention Deficit Disorder with Hyperactivity.” (*Id.* at 10.)



1 Finally, Dr. Blake noted that Petitioner's history suggests marked impairment in all areas  
2 of executive function. (*Id.*) Dr. Blake explained that individuals with impairments in  
3 executive function, or frontal lobe function in general, may demonstrate distractibility,  
4 impulsivity, lack of guilt or shame, lability of mood, low frustration tolerance, periodic  
5 affective disorder such as depression or anxiety, rigidity of thought, concreteness, the  
6 inability to change set (perseveration), poor planning, poor concentration and attention,  
7 poor language function, difficulty regulating behavior, and the inability to recognize  
8 social cues. (*Id.*)

9 In support of his assertion that counsel failed to investigate and explain the effects  
10 of Petitioner's long-term methamphetamine abuse, Petitioner offers the opinion of Dr.  
11 Lawson Bernstein, a licensed psychiatrist with a consulting practice in substance abuse.  
12 (Doc. 167 at 114.) Dr. Bernstein reviewed records and conducted an evaluation of  
13 Petitioner, and concluded that Petitioner had a severe methamphetamine addiction and  
14 was suffering from acute amphetamine withdrawal at the time of the offense, which  
15 would have depleted his brain of key chemicals involved in the maintenance of normal  
16 neurological, cognitive, and emotional states. (*Id.*, Ex. 44 at 1, 5.) Dr. Bernstein opined  
17 that Petitioner would have had no ability to control his methamphetamine abuse prior to  
18 his incarceration. (*Id.* at 6.) Dr. Bernstein also suggested it was possible that Petitioner's  
19 brain damage was due to fetal alcohol exposure, in addition to toxic chemical exposure as  
20 an iron worker and mechanic. (*Id.* at 1, 6.)

21 Finally, Petitioner asserts that, had counsel interviewed family members, they  
22 would have realized that the picture painted by Petitioner's mother was "at best gross  
23 minimization" but more realistically "an outright falsehood" and that Petitioner grew up  
24 in an alcoholic, abusive, and dysfunctional household. (Doc. 167 at 118.)

25 Petitioner asserts that PCR counsel was also ineffective because, in addition to the  
26 deficiency noted above in relation to the guilt-phase portion of the claim, PCR counsel  
27 failed to obtain funding for a mitigation expert, failed to recognize the need and seek  
28 funds for mental health experts, and failed to interview trial counsel.

Petitioner has alleged a substantial claim of ineffectiveness, thereby demonstrating “prejudice” under *Martinez*. However, because it is unclear from the record whether PCR counsel was ineffective under *Strickland* for failing to raise the claim in state court, a hearing is necessary to determine whether PCR counsel acted deficiently and whether there is a reasonable probability the result of the PCR proceedings would have been different. Assessing the latter will necessarily entail considering the strength of the defaulted IAC claim. *Clabourne*, 745 F.3d at 377–78.

#### IV. Evidentiary Development

Petitioner seeks evidentiary development in the form of expansion of the record and authorization of discovery, and also requests that the Court grant an evidentiary hearing to prove the merits of the elements of “cause and prejudice,” as well as the merits of the claims against his trial counsel. (Doc. 167 at 156–78.)

Petitioner seeks to expand the record under Rule 7 of the Rules Governing Section 2254 Cases, to include all of the Exhibits (Doc. 167, Exs. 1–82) cited in his supplemental *Martinez* brief in support of Claim 1D. Respondents concede that Petitioner should be allowed to supplement the record with the exhibits supporting his *Martinez* claim, to show that there is “cause” to excuse procedural default of his claims against trial counsel. (Doc. 175 at 66.) The evidentiary limitations described in *Cullen v. Pinholster*, 563 U.S. 170 (2011),<sup>8</sup> do not apply to Petitioner’s procedurally defaulted ineffective assistance claims because they were not previously adjudicated on the merits by the state courts. *See Dickens*, 740 F.3d at 1320–21. Furthermore, the Court is not restricted, under 28 U.S.C. § 2254(e)(2)<sup>9</sup>, from holding an evidentiary hearing for Petitioner to show cause and prejudice under *Martinez* because Petitioner is not asserting a constitutional “claim” for relief. *See Dickens*, 740 F.3d at 1320–21. Accordingly, the Court considers the new

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<sup>8</sup> Limiting a federal court’s consideration of evidence in support of a claim to the evidence that was before the state court that adjudicated the claim on the merits. 563 U.S. at 180–81.

<sup>9</sup> Limiting the court’s discretion to hold an evidentiary hearing on a claim for relief where the petitioner “failed to develop the factual basis of a claim in State court proceedings.”

1 evidence Petitioner proffers in support of his *Martinez* claims for the limited purpose of  
2 evaluating Petitioner's cause and prejudice arguments.

3 Petitioner also asserts that he is entitled to factual development of his claims not  
4 only for purposes of resolving the *Martinez* issue, but also to resolve whether he is  
5 entitled to relief on the merits of the claim. Respondents contend that, in the event this  
6 Court finds cause and prejudice to excuse the procedural default of Claim 1D, §  
7 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence  
8 when deciding claims that were not adjudicated on the merits in state court." *Pinholster*,  
9 131 S. Ct. at 1401. For the reasons stated below, the Court finds that, if Petitioner can  
10 demonstrate cause and prejudice under *Martinez* to excuse the procedural default of  
11 Claim 1D, he is entitled to an evidentiary hearing on the merits to the extent such a  
12 hearing is necessary to resolve any disputed issues of material fact.

13 The Court's discretion to hold an evidentiary hearing to resolve disputed issues of  
14 material fact is circumscribed by 18 U.S.C. § 2254(e)(2). *See Baja v. Ducharme*, 187  
15 F.3d 1075, 1077–78 (9th Cir. 1999). Section 2254(e)(2) provides, in pertinent part:

16 (2) If the applicant has failed to develop the factual basis of a claim in  
17 State court proceedings, the court shall not hold an evidentiary hearing on  
18 the claim unless the applicant shows that . . . the claim relies on . . . a  
19 factual predicate that could not have been previously discovered through  
20 the exercise of due diligence; and . . . the facts underlying the claim would  
21 be sufficient to establish by clear and convincing evidence that but for  
22 constitutional error, no reasonable factfinder would have found the  
23 applicant guilty of the underlying offense.

24 28 U.S.C. § 2254(e)(2). Thus, if a court determines that a petitioner has not been diligent  
25 in establishing the factual basis for his claims in state court, it may not conduct a hearing  
26 unless the petitioner satisfies one of § 2254(e)(2)'s narrow exceptions, neither of which  
27 are present in this case. If, however, "there has been no lack of diligence at the relevant  
28 stages in the state proceedings, the prisoner has not 'failed to develop' the facts under §  
2254(e)(2)'s opening clause, and he will be excused from showing compliance with the  
balance of the subsection's requirements." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

1 In *Williams*, the Supreme Court found that a lack of diligence, “attributable to the  
2 prisoner or the prisoner’s counsel,” would establish a failure to develop the factual basis  
3 of the claim. *William*, 529 U.S. at 432.

4 Several courts have noted that “the question whether a claim is procedurally  
5 defaulted and whether § 2254(e)(2) bars an evidentiary hearing related to that claim are  
6 analytically linked.” *Wilson v. Beard*, 426 F.3d 653, 665–66 (3d Cir. 2005); *see also*  
7 *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (recognizing that the Supreme  
8 Court in *Williams* “linked” the “failure to develop inquiry” with the cause inquiry for  
9 procedural default, and holding that if petitioner establishes cause for overcoming the  
10 procedural default he has certainly shown that he did not “fail to develop” the record  
11 under § 2254(e).) The Supreme Court in *Williams*, however, noted its interpretation of the  
12 meaning of “failed” in § 2254(e)(2) was supported by the Court’s earlier decision in  
13 *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), in which the Court borrowed the cause and  
14 prejudice standard applied to procedurally defaulted claims to determine if petitioner was  
15 entitled to an evidentiary hearing: “Section 2254(e)(2)’s initial inquiry into whether ‘the  
16 applicant has failed to develop the factual basis of a claim in State court proceedings’  
17 echoes *Keeney*’s language regarding ‘the state prisoner’s failure to develop material facts  
18 in state court.’” *Williams*, 529 U.S. at 433. The Supreme Court further concluded that  
19 “there is no basis in the text of § 2254(e)(2) to believe Congress used ‘fail’ in a different  
20 sense than the Court did in *Keeney* or otherwise intended the statute’s further, more  
21 stringent requirements to control the availability of an evidentiary hearing in a broader  
22 class of cases than were covered by *Keeney*’s cause and prejudice standard. *Williams*, 529  
23 U.S. 433–34.

24 Prior to the Supreme Court’s decision in *Martinez*, this would have made little  
25 difference to Petitioner’s case. The ineffectiveness of PCR counsel could not provide  
26 cause to excuse the procedural default of a claim because PCR counsel was not  
27 constitutionally required and was treated as the agent of the petitioner. *Coleman v.*  
28 *Thompson*, 501 U.S. at 752–54. After *Martinez*, however, PCR counsel’s deficient

1 performance, if it amounts to a *Strickland* violation, can establish “cause” to excuse  
2 procedural default of a substantial claim of ineffective trial counsel. *Martinez*, 132 S. Ct.  
3 at 1316–17. It follows from the line of reasoning in *Williams*, that a petitioner who has  
4 shown “cause” to excuse the failure to bring a claim in state court, which amounts to a  
5 showing of cause to excuse procedural default, has also by definition shown “cause” to  
6 excuse the failure to develop that same claim within the meaning of § 2254(e)(2). Were  
7 this Court to find otherwise, then the harm the Supreme Court envisioned in *Martinez*,  
8 that “no court will review the prisoner’s [trial counsel IAC] claims,” would become a  
9 certainty. *Martinez*, 132 S. Ct. at 1316.

10 Thus, this Court concludes, if Petitioner can demonstrate he is not at fault for  
11 failing to bring the claim, and his procedural default is excused under *Martinez*, he is by  
12 extension not at fault for failing to develop the claim under § 2254(e)(2). *See also*  
13 *Detrich*, 740 F.3d at 1246–47 (plurality opinion) (“[W]ith respect to the underlying trial-  
14 counsel IAC ‘claim,’ given that the reason for the hearing is the alleged ineffectiveness of  
15 both trial and PCR counsel, it makes little sense to apply § 2254(e)(2)”).

16 Next, Petitioner submits that there is good cause for discovery in the form of  
17 depositions of PCR counsel,<sup>10</sup> Dr. John Howard, Sergeant Pesquiera, Detective Bruce  
18 Clark, and former Detective George Ruelas. Petitioner also requests that a subpoena issue  
19 requiring Dr. Howard to produce documents related to Rachel’s death, the autopsy, or  
20 any of his activities related to his pre- and post-trial participation in this case.  
21 Respondents object to all of these requests, asserting that the requests are unnecessary as  
22 the record is adequate to resolve whether he can establish cause under *Martinez*, and  
23 because Petitioner has not shown good cause.

24 A habeas petitioner is not entitled to discovery “as a matter of ordinary course.”  
25 *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Discovery is authorized upon a showing of  
26 good cause, but the “party requesting discovery must provide reasons for the request. The

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27  
28 <sup>10</sup> Petitioner has withdrawn his request for the deposition of trial counsel at this time.

1 request must also include any proposed interrogatories and requests for admission, and  
2 must specify any requested documents.” Rule 6(a) and (b), Rules Governing § 2254  
3 Cases, 28 U.S.C. foll. § 2254.

4 “[A] district court abuse[s] its discretion in not ordering Rule 6(a) discovery when  
5 discovery [i]s ‘essential’ for the habeas petitioner to ‘develop fully’ his underlying  
6 claim.” *Dung The Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) (quoting *Jones v.*  
7 *Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997)). However, courts should not allow a  
8 petitioner to “use federal discovery for fishing expeditions to investigate mere  
9 speculation.” *Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Nicolaus)*, 98  
10 F.3d 1102, 1106 (9th Cir. 1996); *see also Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir.  
11 1999) (habeas corpus is not a fishing expedition for petitioners to “explore their case in  
12 search of its existence”) (quoting *Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir.  
13 1970)).

14 Whether a petitioner has established “good cause” for discovery under Rule 6(a)  
15 requires a habeas court to determine the essential elements of the substantive claim and  
16 evaluate whether “specific allegations before the court show reason to believe that the  
17 petitioner may, if the facts are fully developed, be able to demonstrate that he is . . .  
18 entitled to relief.” *Bracy*, 520 U.S. at 908–09 (quoting *Harris v. Nelson*, 394 U.S. 286,  
19 300 (1969)).

20 In light of Petitioner’s assertions that PCR counsel has refused to communicate  
21 with Petitioner’s habeas counsel, the Court finds that Petitioner has made a threshold  
22 showing of good cause because he has shown that the evidence sought would lead to  
23 relevant evidence regarding his petition. Accordingly, the Court will authorize the  
24 deposition of PCR counsel.

25 The Court finds, however, that at this time Petitioner has not demonstrated good  
26 cause for depositions of the investigating officers. Petitioner asserts Sergeant Pesquiera  
27 should be questioned about the absence of reports of interviews of the employees of the  
28 Choice Market, whether they were done in the first instance, and whether they have been

1 concealed. Petitioner asserts, on information and belief, that Detective Ruelas  
2 interviewed the employees of the Choice Market, and that the employees saw Rachel in  
3 the store on May 1 unharmed, contradicting the prosecution claim that Rachel was beaten  
4 and raped during the trip to the Market. Petitioner asserts that Detective Clark and former  
5 Detective Ruelas should be questioned about the missing interview records, as the  
6 absence of reports of these interviews is relevant to showing the weakness and flaws in  
7 the prosecution's case. The Court disagrees. First, Petitioner's assertions are highly  
8 speculative. Further, as Respondents point out, the absence of any interviews is  
9 irrelevant; Petitioner's claim that such reports would be relevant is based on the mistaken  
10 assumption that the State asserted that Petitioner actually went to the Choice Market  
11 when the Lopez children saw him hitting Rachel. The prosecution asserted that the  
12 evidence showed that Petitioner beat Rachel during their third outing on May 1, 1994; the  
13 State never asserted—nor did evidence suggest—that they went into the market on that  
14 trip. The prosecutor did not argue that Petitioner was going to the Choice Market, but that  
15 the Lopez twins saw Petitioner “as he's driving around in the vicinity of the Choice  
16 Market.” (R.T. 4/13/95, at 98.) The State never contended that Petitioner sexually  
17 assaulted and fatally beat Rachel on a trip to the Choice Market. Petitioner has failed to  
18 establish good cause for these depositions. For the same reason, Petitioner is not entitled  
19 to the requested files from the county attorney and sheriff's office. Finally, Petitioner  
20 asserts that Detective Pesquiera was never cross-examined regarding the deficiencies of  
21 her blood interpretation evidence. But even if Detective Pesquiera were to concede that  
22 her blood interpretation was deficient, it would not be relevant to the Court's analysis of  
23 whether the outcome of the proceedings would have been different if trial counsel had  
24 investigated whether there were innocent explanations for the blood located in  
25 Petitioner's van.

26 Finally, Petitioner asserts that he should be permitted to depose Dr. Howard and  
27 require him to produce relevant records from his participation in this case because he was  
28 not cross-examined on the relevant subject matter, i.e., with respect to the obvious errors



1 if not “outright falsehoods” in his testimony. But Dr. Howard has already submitted a  
2 declaration on Petitioner’s behalf. (*See* Doc. 167, Ex. 1.) Neither statements from Dr.  
3 Howard’s declaration, nor the reports from Drs. Ophoven or McKay, support Petitioner’s  
4 characterization of Dr. Howard’s testimony as “flatly false and misleading” or support a  
5 finding that Dr. Howard, encouraged by the prosecutor, “actively misled” the jury, and  
6 “concealed [his] actual autopsy findings.” (*See* Doc. 167 at 31.) Accordingly, Petitioner’s  
7 deposition and production request for Dr. Howard is denied.

### 8 CONCLUSION

9 Pursuant to the Ninth Circuit’s directive on remand, the Court has reconsidered  
10 Claim 1D in light of *Martinez*. The Court finds that an evidentiary hearing is necessary to  
11 determine whether Petitioner can establish cause to excuse the procedural default of  
12 Claim 1D (Guilt Phase) and Claim 1D (Penalty Phase).

13 Based on the foregoing,

14 **IT IS ORDERED** that an evidentiary hearing to determine whether state PCR  
15 counsel was ineffective for failing to raise Claim 1D (Guilt Phase) and Claim 1D (Penalty  
16 Phase) in Petitioner’s first PCR proceeding shall take place as soon as is practicable. The  
17 Court will issue a separate order setting this matter for a scheduling conference.

18 **IT IS FURTHER ORDERED** that the Clerk of Court shall substitute Charles L.  
19 Ryan, Director of the Arizona Department of Corrections, as Respondent in place of  
20 former Director Terry Stewart, pursuant to Fed.R.Civ. P. 25(d)(1).

21 **IT IS SO ORDERED.**

22 Dated this 18th day of January, 2017.

23  
24 /s/ Timothy M. Burgess

25 TIMOTHY M. BURGESS

26 UNITED STATES DISTRICT JUDGE  
27  
28